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ABSTRACT

The information presented in this booklet concerns both the procedures used by the Office for Civil Rights (OCR) to investigate complaints of discrimination in the public schools (specifically those in Idaho), and the rights of local school people who become involved in such an investigation. An overview of the investigative process and detailed information about each of the steps involved in the process are provided. The responsibilities and legal rights of Idaho school administrators involved in an OCR investigation are described. Taken into consideration is the potential impact of an investigation on the school district. A list of records that might be requested of a district by the OCR as a first step in a compliance review is included. (EB)

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INVESTIGATIVE PROCEDURES
OF THE
OFFICE FOR CIVIL RIGHTS

By
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U.S. DEPARTMENT OF HEALTH
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1979

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INVESTIGATIVE PROCEDURES OF THE OFFICE FOR CIVIL RIGHTS

Few school people disagree with the principles of fairness and justice which have been codified in the various equal opportunity statutes affecting schools. Reservations expressed concerning these laws and their enforcement are usually of another sort:

1. those concerning the added administrative burden imposed by the agencies charged with enforcing these laws; and
2. those reflecting an uneasiness on the part of school people as to the nature and limits of their own authority and prerogatives vis-a-vis those of enforcement officials.

While some progress has been made by the professional establishment in containing the proliferation of administrative requirements, far too little has been done to help local school people understand the nature of procedures involved in the processing of complaints by enforcement agencies, and the rights of local school people who find themselves involved in one way or another in an investigation by the Office for Civil Rights (OCR). This paper is an attempt to address the latter problem.

Readers are cautioned at the outset to recognize that an informal, unofficial overview such as this should never be relied upon as legal authority. When one needs to cite legal authority in connection with these matters, he should refer to such sources as the Title VI Regulation (45 CFR 80) and the U.S. District Court cases of **Adams v. Califano** (Civil Action No. 3095-70 in the District of Columbia) and **Women's Equity Action League v. Califano** (Civil Action No. 74-1720 in the District of Columbia.)

OVERVIEW OF THE INVESTIGATIVE PROCESS

An investigation by the OCR can be initiated in either of two ways:

1. it can take the form of a routine compliance review initiated by the OCR itself under authority of Section 80.7(a) of 45 CFR 80, Nondiscrimination in Federally-Assisted Programs, HEW Regulation Under Title VI of the Civil Rights Act of 1964 as amended; or

2. it can result from a complaint filed with the OCR either

   a. by an aggrieved party or his representative on behalf of the aggrieved party, or

   b. by any person on behalf of any group which he believes to be the subject of discrimination prohibited under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1967, or Section 504 of the Vocational Rehabilitation Act of 1973.

Since compliance reviews are undertaken relatively infrequently, and since they vary from complaint investigations in minor ways largely associated with scheduling of activities, this paper will be concerned primarily with the complaint investigation. The compliance review will be treated briefly in a concluding section of this paper.

It should be noted here that the basic investigative and appeal processes are set out in the Title VI Regulation and incorporated by reference into the regulations for Title IX, Section 504, and the Age Discrimination Act.

OVERVIEW

Step No.	Time for Completion of Step	Total Time from Receipt of Complaint	Description of the Step or Phase
I	15 days	15 days	Complaint is received by OCR and analyzed.
II	90 days	105 days	OCR must complete its investigation and determine whether or not the district is in compliance with the equal opportunity laws.
III	90 days	195 days	If OCR finds a reasonable cause to believe that the district is out of compliance, it has 90 days within which to negotiate a plan for voluntary compliance on the part of the delinquent district. If such efforts are not undertaken within the established time limits, OCR may be found in contempt of court.
IV	30 days	225 days	If a district is found to be out of compliance and voluntary compliance cannot be achieved, OCR has 30 days within which to initiate formal enforcement proceedings. If formal enforcement proceedings are not initiated within this period, OCR may be found in contempt of court.
V			If the responsible official in the OCR determines that compliance cannot be achieved by voluntary means, he may (1) initiate enforcement actions by commencing administrative proceedings, or (2) refer the case to the U.S. Justice Department with a recommendation that appropriate proceedings be brought to enforce any rights of the Federal government under any state, local, or Federal law. Before a suspension or termination order becomes final, the district must be given an opportunity for a hearing. If the hearing option is exercised the Hearing Examiner finds in favor of the district, the case ends at that point. If the option for a hearing is not exercised, or if it is exercised and the Hearing Examiner finds in favor of the OCR, the case goes before a Reviewing Authority in the Department of Health, Education and Welfare (HEW). Barring any action to the contrary by the Reviewing Authority, the decisions of the responsible OCR official and/or the Hearing Examiner stand. The district may request, but not demand, a review by the Commissioner of Education of an adverse decision by the Reviewing Authority and the Commissioner has the discretion of reversing the decision below. In the absence of such a review and decision, however, the decision of the Reviewing Authority is the final decision of HEW. At this point, the case is forwarded to the committees in the U.S. Senate and House of Representatives having legislative jurisdiction over the affected Federal funds. Barring action in favor of the district by one of these committees within 30 days of the final decision by HEW, the suspension or termination order of HEW will take effect. The final recourse of the school district at this point is to seek judicial review of the record of the case in the appropriate Federal Court of Appeals. The letter from the OCR which notifies the school district that Federal funds have been terminated normally notifies the district of its right to seek judicial review.

THE INVESTIGATIVE PROCESS

An outline can be a useful device in sorting and organizing information. But school administrators who stand to have direct contact with the OCR need more detailed information about each of the steps in the above outline.

Step I.

The Complaint. On receipt of a complaint against a school district, the OCR analyzes the complaint, evaulates it, and replies to it. Normally, the procedures followed within the OCR in Region X are as follows:

1. A complaint is received and assigned to a staff investigator for action.
2. The investigator examines the complaint for completeness, i.e., whether it identifies in writing:
   a. those injured by the alleged discrimination;
   b. the institution or individual, (by name and address), alleged to have discriminated;
   c. the approximate date or dates on which the alleged discriminatory acts occurred; and
   d. sufficient information concerning the alleged discrimination to permit the OCR to commence an investigation.
3. The investigator determines whether or not the OCR has jurisdiction in the case by establishing such matters as whether:
   a. the complaint is directed against a recipient of Federal financial assistance;
   b. the alleged discriminatory acts would, if true, constitute a violation of a law for which HEW has enforcement responsibility; and
   c. the complaint was filed within the 180 day limit following the occurence of the alleged discriminatory act.
4. Within 15 calendar days of receipt of a complaint, the investigator:

a. informs the complainant that the complaint has been received;

b. requests any further information needed to complete the formal complaint;

c. informs the complainant of his right to have his name withheld from the district, and requests the complainant to sign a "consent form" allowing the OCR to disclose his name in communications with the school districts (if a name is needed to enable OCR to investigate the case, and no name is given); and

d. solicits further information pertaining to the investigation, e.g., a list of the names and addresses of witnesses who may have further information bearing on the case.

Step II

Investigative Plan. The second phase of the processing of a complaint by the OCR begins with the preparation by the investigator of an investigative plan for the review and approval of both the investigator's immediate supervisor and the OCR's general counsel. The investigative plan contains such information as:

1. a list of the elements of proof sought in the investigation;

2. the specific information requested from the district;

3. a time schedule covering the entire span of the projected investigation including dates of on-site interviews, reports, etc.; and

4. a discussion of the kinds of witnesses to be interviewed.

Informing the District. After the investigative plan has been approved by the investigator's supervisor and the OCR's general counsel, the Director of the Regional Office of the OCR (Regional Director) sends to the school district a letter which:

1. informs the district management that OCR has received a complaint;

2. cites the relevant section of law bestowing jurisdiction on OCR for investigating the complaint;

3. identifies the person filing the complaint (if permission to do so has been granted by the complainant);

4. states the allegation and the date on which the alleged discriminatory act is supposed to have occurred;

5. informs the district management of its responsibility to preserve any records bearing upon the allegation and to refrain from taking any kind of intimidating or retaliatory action against the person filing the complaint;

6. informs the district management of its procedures and time schedules for processing complaints;

7. if an on-site investigation is planned, informs the district management of the date scheduled for the investigation of the complaint; and

8. requests from the district certain specific items of information to be submitted to the OCR not later than a specified date, e.g., a copy of the district's handbook on personnel recruitment and selection procedures, a schedule of the district's administrative personnel listed by sex, salary, and ethnicity, a schedule of the students who have been expelled during the preceeding three years analyzed by the race or national origin of these students, or a schedule of dropouts during the preceeding three years analyzed according to the sex, race or national origin of the students involved.

Additional reasonable requests for information may follow the initial request at the discretion of the investigator, depending upon the course taken by the investigation. In general, it can be said that OCR has a legal right to specify the information it needs, but not the format in which that information is recorded and presented. However, the courts hold the district as well as the OCR to a standard of reasonableness. In some cases the OCR investigator may arrive at his findings on the basis of this kind of documentary evidence alone. In other cases it may be necessary for him to observe firsthand the situation in the district.

At the present time the OCR is attempting, when appropriate, to conciliate some complaints by encouraging the parties to work out their differences informally. This is not a routine operation, however. When it is employed, it can occur at any time during the early stages of the procedure for handling complaints. If the conciliation procedure is offered by the OCR and accepted by the parties, the OCR continues to monitor the process in order to assure

that any settlement which might be reached is actually implemented.

At about the same time that the district is notified that a complaint has been filed against it, the complainant is also notified of his rights to request:

1. written, preliminary findings of the investigation and of the specific facts upon which such findings are based, and

2. copies of all HEW correspondence to the school district pertaining to HEW's determination with respect to the complaint as to whether or not a violation has occurred.

On-Site Investigation. If the OCR investigator finds it necessary to conduct an on-site investigation he will so inform the superintendent by letter and suggest a date for the visit. The superintendent may suggest changes in the schedule which make the on-site investigation less obtrusive and disruptive of normal school operations. But the Title VI Regulation 45 CFR, Section 80.6 (c), clearly gives the OCR investigator authority "during normal business hours" to have access to the books, records, accounts, and other sources of information and to the school facilities when these may be pertinent to ascertaining the district's compliance with the Regulation. Furthermore, in signing the HEW Form 441, "Assurance of Compliance With the HEW Regulation Under Title VI," which every school district does in order to receive Federal financial assistance, the district "agrees that it will comply with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education and Welfare (45 CFR Part 80) issued pursuant to that title . . ." District personnel should expect, therefore, that in all likelihood, the OCR will one day exercise the rights granted it under the Regulation and the Agreement. A failure on the part of the district to cooperate with OCR investigators or to provide the requested information pertaining to a complaint is the kind of contract breach, usually called "denial of access," anticipated in Section 80.8 (a) (1) of the Regulation which allows the OCR to refer a case to the U.S. Department of Justice for prosecution.

For its part, the school district has the right to expect that the investigation will be conducted in a fair, orderly, and responsible manner such as to have the least possible disruptive effect on the

normal operation of the school. District personnel are not required to surrender administrative control over any aspect of the school's affairs to OCR personnel, including the maintenance of the integrity of the school's records; and OCR personnel can reasonably be expected to follow the established rules governing the conduct and movement of non-school personnel while on school property.

In view of the foregoing consideration, it seems clearly to the advantage of all concerned that the details of the OCR on-site visit to the school be worked out in advance. Interviews with teaching personnel and visits to observe classes can be scheduled at times that cause the least interference with routine school operation; pertinent information requested by the OCR can be compiled or prepared in advance; legal counsel or other representatives or witnesses can be retained where desired; and so forth.

This is not to suggest that the on-site investigation should be regarded in overly legalistic terms: it is, however, to suggest that a structured, business-like approach is as appropriate to the school's relations with the OCR as it is in connection with any other aspect of the school's official business.

Typically, the on-site investigation begins with an interview with the district's superintendent. School people frequently seem to regard these interviews with considerably more apprehension than is justified. The purpose of these interviews is not to take sworn testimony as in a court of law, but merely to gather information which may or may not prove useful to the investigator in finding more substantial evidence pertaining to the allegations which have been made against the district. Unsubstantiated information gained in these interviews is very weak evidence and, by itself, is seldom used by OCR personnel in deciding on the merits of an allegation. During the initial interview with the superintendent, the OCR investigators formally identify themselves and briefly review their reason and authority for being in the district. They explain that those interviewed are normally allowed to have an attorney or other witness present during the interview, and proceed to ask a series of questions dealing with the "cast of characters" in the district, their various responsibilities and administrative relationships. Depending on the size of the district and the complexity of the issues involved in the case, this initial interview may or may not get into matters which are more substantial to the investigation.

Occasionally the OCR investigator will make an electronic record

of the interview. When this is done, the interviewee may request a copy of the recording. Alternatively, the interviewee may make his own recording of the interview in which case the OCR investigator may request a copy. Similarly, the interviewee may request to preview a copy of any transcription of the interview made by the OCR investigator before that transcription is made a part of the official record of the case. Finally, the interviewee may request to be allowed to submit his information in the form of a written statement responding to pre-specified questions. It must be kept in mind that, while the OCR does not have the power to subpoena information, it can place the burden of providing information pertinent to the investigation on the school district; and this applies to any relevant information which may be in the possession of school district employees. Furthermore, the OCR has the authority to determine the adequacy of the information submitted, OCR's recourse being a referral of the case to the Department of Justice for prosecution as a "denial of access" case.

Following the initial interview with the superintendent, the investigator may want to examine additional information from the district's records, begin interviewing other employees of the district, or observe certain aspects of the school program in operation. If additional information is needed from the school records, and if that information is of a kind for which a written request is routinely required, the school has a right to insist that the request be reasonably specific and in written form. Regardless of the precise course taken by the investigation, the investigator is required by law to:

1. contact the complainants and witnesses having information relevant and material to determining whether a violation has occurred;
2. afford complainants a full opportunity to present all evidence in support of the complaint;
3. inform complainants in writing of preliminary findings which are adverse to the complainant and of the specific facts upon which the preliminary findings are based; and
4. afford complainants an opportunity to present additional evidence prior to drawing conclusions concerning the complaint.

Not uncommonly, a group of similarly situated interested parties will ask to meet with the OCR investigators to present evidence relevant to the investigation. At these meetings, the normal procedure is for the investigator to explain the nature of the proceedings and the limits of his jurisdiction, and then simply to invite from the public comments or questions bearing on the complaint or review in progress. Investigators discourage inflamatory and unproductive rhetoric at these meetings and try to keep them focused on matters within the jurisdiction of the OCR. On the other hand, public meetings are, by their very nature, not easily controlled; and if the OCR investigator is to maintain any degree of credibility with audiences which frequently do not understand the subtleties of jurisdiction and the limitations on sanctions, and are, anyway, rather jaded to the words of government officials, he has to be tolerant of testimony, complaints, and observations of a considerable variety and scope. From these meetings, the investigator may or may not develop information having a bearing on the case. Ordinarily these meetings are closed with a few remarks intended to reemphasize the limitations of OCR jurisdiction, to clarify the nature of available sanctions, and generally to avoid raising unrealistic expectations among the participants.

The final phase of an on-site investigation is an exit interview with the superintendent in which the superintendent is given an opportunity to add anything to the record which he feels is necessary and relevant to the case

If at this point the OCR anticipates a finding not favorable to the complainant, it is required to advise the complainant of the evidence for such a finding either by showing the evidence or by summarizing it, and further, to provide the complainant a timely opportunity to respond to such evidence.

Step III.

Findings and Remedies. At some point the OCR investigator terminates the investigation and drafts a report of his findings. This report is reviewed by the Branch Chief and the OCR general counsel and, eventually, a letter of findings is issued to the complainant and the district. The letter of findings must:

1. address all allegations and issues raised in the complaint and during the investigation;

2. set out the OCR's conclusions regarding each allegation and issue;

3. provide the OCR's explanation or analysis of the relevant information on which the conclusions are based;

4. inform the district of any corrective action required of it in order to come into compliance, of the 30 day time limit for submitting an approvable compliance plan to the OCR, and of the subsequent 60 day time limit within which OCR must negotiate a settlement with the district or initiate formal enforcement action by commencing administrative proceedings; and

5. inform the district of the technical assistance available to it from the OCR, the Desegregation Assistance Centers, and the State Department of Education for developing such a plan.

Additionally, the OCR must notify the complainant that, upon request, it will provide the complainant a copy of all HEW correspondence sent to the district subsequent to the letter of findings which pertains to the OCR's findings with respect to the complaint.

If the OCR finds in favor of the complainant, i.e., makes a finding of discrimination on the part of the district, it is required by law to undertake exhaustive, good faith efforts to achieve voluntary compliance on the part of the school district. Prior to initiating efforts to negotiate such compliance, however, the OCR is required to consult with the complainant to obtain any information he has which may be needed to fashion an appropriate remedy. During the course of negotiations between OCR and the district, the OCR is required to keep the complainant advised of the status of the negotiations as they apply to the remedy being sought by the complainant; and if corrective action is secured, the OCR must notify the complainant of the corrective action taken.

If the district submits a plan, the OCR may accept it in whole or in part, or it may assist the district in developing a plan. Through this kind of negotiations with the district, a mutually acceptable plan can usually be agreed upon. If such an agreement is reached, it

becomes legally binding on the school district as the remedy required to bring the district into compliance with the equal opportunity laws. Not uncommonly, these remedies are significantly more exacting than are the requirements for compliance **before** a violation of the equal opportunity laws have been found.

Step IV.

Enforcement Proceedings. After a district has been found to be out of compliance with the equal opportunity laws, and after the required 90 day period of attempts by OCR to negotiate voluntary compliance has expired without success, the OCR is required by law to initiate formal enforcement proceedings within 30 days or risk being held in contempt of court.

At the time the OCR informs the district that it is beginning enforcement proceedings, it also offers the district the opportunity for a hearing before an administrative law judge, or Hearing Examiner, in HEW. The notice to the district of its opportunity for a hearing must:

1. be given by registered or certified mail, return receipt requested,
2. advise the district of the action proposed to be taken and the specific provision of law under which the proposed action is to be taken;
3. advise the district of the matters of fact or law asserted as the basis of the proposed action; and
4. fix a date not less than 20 days after the date of the registered notice within which the district may request of the OCR that a hearing be scheduled.

Hearings are usually held as close as possible to the school district, before a Hearing Examiner appointed by HEW under the provisions of 5 USC 3105 and 3344 (Section 11 of the Administrative Procedure Act). Both the time and place of the hearing are subject to change if the district can show good cause. The district may waive its right to a hearing and choose to submit its side of the case in writing for the record.

Step V.

Justice Department. In certain unusual circumstances, even a threatened failure to comply with the equal opportunity laws can justify the OCR in initiating termination procedures. For example, refusal by a district to allow OCR personnel to have access to its facilities or pertinent information might result in a referral of the case to the U.S. Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any local, state, or Federal law. Under most ordinary circumstances, however, enforcement procedures are handled administratively within HEW. In fact, very few cases ever go beyond Step IV of the process outlined here.

Hearing. The purpose of the hearing before an administrative law judge is to give the district an opportunity to present its case anew before a forum which is independent of the investigative/accusatorial agency, i.e., the OCR. The hearing is not merely a reviewing body which confines its attention to the record already compiled by the OCR investigators: it is a separate tribunal, albeit an informal and administrative one, at which the district is allowed to:

1. be represented by counsel;
2. introduce evidence and examine evidence introduced by the OCR;
3. call witnesses on its own behalf;
4. cross-examine witnesses who testify against it; and
5. try to refute facts and arguments advanced by the OCR against it.

The Hearing Examiner is required to base his decision solely upon the evidence presented at the hearing and to issue written findings. These findings may take the form of either (a) an initial decision in the matter or (b) recommended findings and a proposed decision. In either case, the record of the hearing is certified by the Hearing Examiner to a reviewing Authority within HEW who eventually makes the final decision.

If the district waives its right to a hearing, the case goes directly to a Reviewing Authority in HEW. This Reviewing Authority must either:

1. make a final decision in the case on the basis of the record compiled by the OCR investigators, or

2. refer the case to a Hearing Examiner for an initial decision to be made on the basis of the record compiled by the OCR investigators. In the latter case, the initial decision of the Hearing Examiner becomes the final decision of HEW in absence of a decision to the contrary by the Secretary of HEW.

Reviewing Authority. The final task of the Hearing Examiner is to certify the entire record of the hearing to the Reviewing Authority, including either:

1. his own initial decision (when he is authorized to make such a decision), or

2. his recommended findings and proposed decision.

At the same time the record is certified to the Reviewing Authority in HEW, a copy of the initial decision or certification must be mailed to the school district.

If the Hearing Examiner makes an initial decision which is certified to the Reviewing Authority, the district must be given an opportunity to file exceptions to that initial decision. If the district fails to take advantage of the opportunity to file exceptions, the initial decision of the Hearing Examiner becomes the final decision of HEW unless the Secretary of Education chooses to intervene in the case.

If the district files exceptions to the initial decision of the Hearing Examiner, the Reviewing Authority must review the initial decision and issue its own decision with supporting reasons for that decision.

When the record of a case is certified to the Reviewing Authority with the recommended findings and proposed decision of a Hearing Examiner, the school district must be given a reasonable opportunity to file with it briefs or other written statements of its contentions. A copy of the final decision of the Reviewing Authority must be given in writing to the school district and to the complainant.

Findings. Each decision of a Hearing Examiner or Reviewing Authority must set forth a ruling on each finding, conclusion, or

exception resulting from the OCR investigation, and it must identify the specific requirements of the Title VI Regulation (45 CFR 80) with which it is found that the school district has failed to comply.

Secretary of HEW. Either the school district or counsel for HEW can request that the Secretary of HEW review a decision by the Reviewing Authority. However, this review is not a right of the parties, but is discretionary on the part of the Secretary. Review by the Secretary is granted only when the Secretary determines that there exist special and important reasons for granting it. The Secretary may grant or deny such requests in whole or in part, and he may initiate such reviews on his own motion. In the absence of a review by the Secretary, a final decision by a Reviewing Authority or Hearing Examiner as described above becomes the final decision of HEW.

Failure by a school district to file an exception with a Reviewing Authority or to request review by the Secretary of HEW cannot be considered a failure to exhaust administrative remedies for the purpose of seeking judicial review of the case.

Congressional Committees. After a final decision by HEW, the record of a case is forwarded to the committees in the U.S. House of Representatives and the U.S. Senate having jurisdiction over the affected Federal funds. Political intervention at this point can result in setting aside the final decision of HEW.

Judicial Review. The letter from the OCR which notifies the school district of a final adverse decision by HEW in a particular case also notifies the district of its right under Section 602 of Title VI (as incorporated into Title IX by 45 CFR 86.71) to judicial review of the action taken by HEW. Judicial review is a process by which action of a Federal agency which adversely affects others is reviewed for its lawfulness by a court of competent jurisdiction, usually a Federal Circuit Court of Appeals. Thus, while it is true that HEW officials are invested by statute with broad authority and discretion in the area of civil rights enforcement, and while it is true that judicial review is not intended to guarantee "correct" results on the part of HEW, these Federal officers are held by the Federal courts to a strict standard of accountability as regards the procedures they employ and the interpretation they give to the law. Judicial review tests whether HEW has:

1. exceeded its constitutional or statutory authority;
2. properly interpreted the relevant laws;
3. conducted a fair and just proceeding; and
4. not acted arbitrarily, capriciously, or unreasonably.

In short, judicial review operates as a check on abuses and excesses in HEW actions.

Judicial review is available to a district only after it has exhausted its administrative recourse as outlined in this paper. Judicial review is concerned primarily with matters of law rather than with matters of fact. That is to say, the court examines the record of the case under review for evidence of the extent to which HEW has interpreted and applied the relevant statutes correctly and has proceeded in the conduct of its responsibilities according to the laws which control the actions of government agencies, e.g., the U.S. Constitution and the Administrative Procedures Act. Fact questions are usually reviewed by the court only to the extent necessary to determine whether the HEW findings are supported by substantial evidence when the entire record of the case is considered.

Since judicial review of agency action is a review of the record of a case, it is important that a district make certain that all suspected departures from lawful procedures by HEW representatives be noted in the official record for future review at the proper time. For example, disputes between school districts and OCR over the educational worth of proposed remedies are not uncommon. If a school district has strong reason to believe that the remedy proposed by OCR is not supported by competent research, educational theory and practice, and expert professional judgment, and if the OCR nevertheless adopts an unyielding position in insisting that its remedy must be adopted by the school district, the school may have grounds for noting an exception for future judicial review. The point of law involved here is whether or not the OCR has acted reasonably and truly made a good faith effort to achieve voluntary compliance on the part of the school district.

Most HEW decisions are left untouched by judicial review.

DEALING WITH THE OCR INVESTIGATORS

The equal opportunity laws merely make explicit certain principles of equality and justice which are deeply ingrained in the view of democratic society which American education seeks to perpetuate. For that reason, nothing could be more reprehensible than for one who calls himself an educator to participate in any enterprise which operates to deny certain persons access to the opportunities offered by public schools. And, of course, it is this very fundamental importance of the principles of equality and justice to American education that makes any implication that educators might purposely or knowingly violate them especially odious and offensive to educators themselves. It is not, therefore, too surprising to find that many school people who are not familiar with certain subtle legal distinctions are less than enthusiastic about the prospect of having their professional decisions and actions reviewed and judged by Federal officers outside the field of education. A major purpose of this paper is to help dispel certain unrealistic views of the OCR and its powers and procedures to the end of promoting more positive and educationally productive relationships between educators and OCR representatives.

Public Administration. Perhaps the most important thing for Idaho school administrators to remember is that they are duly appointed administrative officers of a state institution charged with achieving a necessary public purpose. As such they are charged by the Idaho Constitution and the state legislature with certain stewardship and ministerial responsibilities which the presence of Federal agents in the district or school in no way abrogates. The protection of students, security of public property, maintenance of the integrity and efficiency of the educational and administrative processes of the school — these are basic responsibilities of which the individual educator can be relieved only by his own administrative supervisor, the local or state school board, or the state legislature.

Thus, the first responsibility of local school personnel is to carry out the officially established policies and procedures of the school district and of course, to abide by the ethical principles of their profession. Where there is an apparent conflict with relevant law, it is the duty of school personnel to so inform the governing body. Under such circumstances, it seems clear that with certain exceptions, OCR personnel and their business enjoy no special status and may be treated routinely on a "business-as-usual" basis.

The exceptions are those noted in the Title VI Regulation to which the district binds itself by signing the HEW Form 441, e.g., to provide the OCR with specific information which is pertinent to its investigations, and to allow OCR personnel access to school facilities and records during normal business hours. Thus, if the district has reasonable rules and regulations designed to control the movements of strangers on school property and prevent interruptions of classes, (e.g., by having non-school personnel check in at the district and/or building principal's office and be escorted from one location to another), such rules and regulations can be applied to OCR personnel as well as to any other outsider. Similarly, while the school is obligated to provide OCR investigators with pertinent information and is disallowed from claiming confidentiality of information as grounds for withholding it, the district is not required to violate the privacy of its students or patrons with respect to information that is not pertinent to the subject of the investigation. Disputes over the reasonableness and relevance of specific requests for information should, no doubt, be turned over to the proper legal experts for resolution. It goes almost without saying that ad hoc rules and regulations which apply only to OCR personnel would not be legally defensible.

In short, contrary to opinions which one frequently hears expressed, the district does not, in signing the Assurance of Compliance agreement, bargain away any of its rights to control its own affairs, It does, however, freely enter into a legally enforceable contract, the terms and implications of which should be studied before signing.

Administrative Law. Of utmost importance in putting the OCR investigation in its proper perspective is understanding that the statutes involved belong to the general class of law known as administrative law and not to either criminal law or tort law. Accordingly, the equal opportunity laws which authorize OCR investigations of school districts are concerned with regulating certain kinds of activities of certain of the organs of state government to assure that those arms of the government are operating in a prescribed manner. Generally, the equal opportunity laws treated here are aimed at controlling the actions of institutions, not the actions of individual persons, except as those persons might function as agents of the state. Thus an OCR investigation is to be viewed not as an effort to place individual criminal culpability, or

liability for damages, but as a means by which the United States Congress exercises administrative supervision over the use of funds which it grants to school districts.

While school administrators are very unlikely to be found personally liable as a result of an OCR investigation, and while very few OCR investigations ever result in funding losses to schools, these investigations do involve serious matters and can result in serious consequences for administrators. For one thing, involvement with civil rights enforcement agencies is almost never pleasant or of short duration. They are often distracting, time consuming, embarrassing, and damaging to community relations. Moreover, for the professional educator interested in advancing his career, allowing his school to become involved in such an investigation is not likely to be regarded as much of a professional recommendation.

The Interview. As should be evident from the preceding overview of the investigative process, the on-site portion of an OCR investigation is not a casual, informal visit to the school on the model of, say, a visit by an accreditation team. Prior to arriving in the school district, the OCR investigators will have thoroughly studied the case both in terms of the relevant facts and the legal dimension of the matter. And presumably, if such study had suggested that the case were weak, the OCR would not have deemed an on-site investigation necessary. The very presence of the investigators in the district, therefore, is an indication that the OCR has reason to take the allegation seriously.

Furthermore, by the time the OCR investigators arrive in a school district, the issue will have become, in an important sense, a legal in addition to an educational one. Local school people may well have become aware of serious educational problems during the course of the OCR investigation and still legitimately prefer to minimize their involvement with the OCR in working toward a solution to those problems. In this connection, it is extremely important that school officials give serious consideration to the merits of complaints filed against the school from the outset and make every honorable and professionally acceptable effort to settle differences with complainants before the OCR becomes officially involved. If the school's good faith attempts voluntarily to resolve complaints fail and the OCR does initiate an investigation, it is at least worth remembering that the OCR also has strong interests in resolving

complaints as quickly as possible and that the school district has the option of vigorously fighting the case up through the entire range of appeals outlined above and still settling with the OCR at any moment before the final order to terminate financial aid to the district takes effect.

This, a cordial, cooperative, business-like approach to the interview situation is the most honest and appropriate. Because the investigation is a serious legal matter, it is altogether appropriate for school people to have the counsel of the school attorney during their interviews. However, if the school chooses to make the services of its attorney available to its employees who may be involved in the allegations against the school, it should take special care not to imply any element of coercion of those employees who may not want to take advantage of such an offer.

While the OCR does not have the power to subpoena testimony from school people, it does have the option of placing the burden of securing information from school employees on the school district. Failure of the school district to respond in such a situation could constitute a case of "denial of access" by the district. It is worth repeating here, however, that there is usually no reason not to cooperate with the OCR's requests for interviews. There is an understandable reluctance on the part of most people to getting involved in complex legal matters which they incompletely understand. On the other hand, submitting to an interview by OCR investigators is quite a different matter from being cross-examined under oath in a court of law, or even from being interviewed by a policeman in a criminal matter. The legal status of the interview and its possible consequences are quite different. Furthermore, to submit to an interview is not, so to speak, to put oneself irrevocably at the mercy of the interviewer; the interviewee has certain rights and privileges which allow him to maintain control of the situation insofar as he is personally affected. For example, the interviewee:

1. is not under oath during the interview and is, therefore, free to decline to answer any question put to him by the investigator;

2. is normally allowed to have an attorney or other witness present during the interview;

3. has the right to make a record, including an electronic recording, of the interview; and

4. has a right to inspect any transcription of the interview made by the OCR and to submit corrections to it before the transcription is made a part of the official record of the investigation.

Finally, the interviewee has a right, if he thinks it necessary, to claim the protection of the Fifth Amendment to the U.S. Constitution against self-incrimination, even though the procedure in question is administrative rather than criminal in nature. This protection is, of course, extended to the interviewee only as an individual private person and not in his role as an agent of the school. Institutions do not enjoy the protection of the Fifth Amendment against self-incrimination. Needless to say, claims of Fifth Amendment personal protection cannot be used to justify withholding of information pertaining only to the compliance status of the district.

THE COMPLIANCE REVIEW

Definition and Selection Criteria. A compliance review is a formal examination and evaluation by the OCR of school district policies and practices conducted for the purpose of determining the extent to which the affected district is complying with the equal opportunity laws. Such reviews may be comprehensive or selective with respect to which laws, or which portions of laws, will be involved. HEW is required by law to conduct an unspecified "appropriate" number of these reviews each year. The exact number to be conducted in a given state within a given year may be set out in the annual operating plan for the branch office of the OCR for the HEW Region within which the given state is located.

Criteria for the selection of schools to be reviewed for compliance are flexible. The single most important consideration in the selection process is probably the compliance posture of districts as reflected in the data submitted to the OCR by the districts themselves in the HEW/OE Forms 101 and 102.

Another significant consideration is the potential impact of a proposed review on surrounding school districts. With its limited resources OCR is naturally interested in maximizing the effects of each compliance review. It is, therefore, not likely to select small, out-of-the-way, low-visibility districts as subjects for compliance reviews.

Still another consideration in selecting districts for review is the number of complaints originating in the geographic region in which the district is located. Since the OCR is the tool by which the U.S. Congress exercises administrative supervision over certain recipients of Federal funds, the OCR attempts to exercise this responsibility over as broad an area as possible. The compliance review is an ideal mechanism to allow the OCR to supervise compliance in those areas where very few complaints originate.

From the foregoing, one might conclude that, in a state such as Idaho, a medium-size school district situated in a center of commercial activity with a good daily newspaper and located in a geographic region producing few equal opportunity complaints would be a likely choice by the OCR for a compliance review, particularly if that district's HEW Form 101/102 data suggested areas of noncompliance within the district.

Time-Frames. The schedule of activities for conducting a compliance review is very similar to that for a complaint investigation. That is, the OCR has 90 days from the beginning of the review to make its determination about district compliance. For districts found to be out of compliance, the OCR has another 90 days in which to negotiate voluntary corrective action by the district. If negotiations fail, the OCR has another 30 days within which to initiate formal enforcement proceedings.

During the course of a compliance review the OCR is required by law to afford parents, students, and employees of the district an opportunity to present the OCR information regarding the district's compliance status.

Information Requests. As indicated above, the quality of a district's pertinent records can be an important factor in determining whether or not it is selected to undergo a compliance review. If the district is selected for review, the quality of recorded information becomes even more important. The following list is fairly exhaustive of the kinds of information that might be requested of a district by the OCR as a first step in a compliance review.

1. Information pertaining to the District's Title IX Self-evaluation.
2. Employment

a. Organizational chart of school system personnel for both the administrative staff and for separate schools.

b. The number and percentage of employees by sex for each major job classification (teacher, supervisor, administrator), by level (elementary, junior high, senior high, district-wide).

c. Copies of position descriptions and salaries and descriptions of the qualifications and selection criteria for each job position. Include the values given specific selection factors and a description of how weighting values were determined and used.

d. Published salary schedules for both certificated and non-certificated positions.

f. Average entry salary by sex. Average salary and grade of 5-, 10-, 15-year employees by sex.

g. Information regarding payroll data:

1) for certificated staff

a) by sex;

b) by name, or other identifier;

c) by job title and location of assignment;

d) by highest degree or (if counted for salary purposes) highest degree and hours beyond that degree;

e) total years experience;

f) total years experience in school district;

g) yearly salary, including pay for extra assignments and description of such assignments;

h) number of months or days employed per year;

i) full-time or part-time;

j) dates of last two promotions.

2) for non-certified staff

a) by sex;

b) by name or other identifier;

c) by job title and location of assignment;

d) number of years of schooling, highest grade (degree) obtained, if educational background is an employment criterion;

e) years employed in present position;

f) yearly salary;

g) hours of employment;

h) amount of extra pay received the previous school year;

i) assignment(s) for which extra pay was awarded;

j) number of months or days employed per year;

k) full-time or part-time;

l) dates of last two promotions.

h. Average time in grade (between promotions) of employees by sex.

i. Copies of all policies relating to granting of leaves of absence, including those for temporary disabilities, extended medical leave, and for pregnancy and related conditions, which have been in effect since June 23, 1972.

j. Copies or descriptions of any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan which the District has administered, offered, operated, or participated in since June 23, 1972.

k. Descriptions of any administrative internships or training programs operated by the District or in which the District personnel participate, including:

1) Name (or other identifier) and sex of individuals participating in such programs for the past five years;

2) Means used to inform potential applicants or enrollees of the program;

3) Criteria for selecting participants.

l. A list of institutions which employment recruiters visited, to which employment recruitment information (including notices of openings) was sent, or from which employment referrals were sought each of the past three years.

m. List of all extracurricular assignments undertaken by certificated and non-certificated staff including:

1) Name (or other identifier) and sex of individual;

2) Brief description of assignment (choir director, etc.);

3) Amount of any additional salary received for the assignment;

4) Information needed to determine whether extra-curricular activities undertaken by staff were voluntary or mandatory.

3. Course Offerings

a. Name and number of all classes enrolling 80% or more students of one sex.

b. The District's explanation of why enrollment in such courses is predominantly of one sex.

c. Name and number of all courses in which enrollment by members of one sex is required.

d. Name and number of all courses where instruction is offered separately on the basis of sex, and curriculum guides for such courses.

e. Student handbooks and other descriptive information provided students for the past three years to aid them in selecting courses and programs.

f. Obtain a list of student placements in work-study or cooperative education programs for the current year including:

1) Title of the course;

2) Employer;

3) Specific work assignment;

4) Salary or hourly wage and number of hours per week employed;

5) A description of the Local Educational Agency's role including counseling, in obtaining placements.

4. Student Services

a. Description of all student services, including but not limited to counseling, health, employment and services for special needs.

b. Copies of any insurance policies which the recipient makes available to students.

c. The names, including form and date of publication, of any appraisal instruments used in counseling students or assigning them to programs.

d. A description of the internal procedures being used to ensure that appraisal and counseling materials do not discriminate on the basis of sex.

e. For each elementary, junior high and high school, as appropriate, the number of students enrolled in the following categories of courses or programs:

1) business and office occupations;

2) industrial and trade;

3) home economics;

4) health occupations.

f. If the number of individuals of one sex enrolled in any of the above categories is substantially disproportionate (80% or more), please indicate what action has been taken by the District to assure that such disproportion is not the result of sex discrimination in a counseling or other instrument or its application.

g. For each elementary, junior high, and high school, where a particular class contains a substantially disproportionate number of individuals of one sex (80% or more), please indicate the action taken by the District to ensure that such disproportion is not the result of sex discrimination in counseling or appraisal materials or by counselors.

5. Athletics

a. Intramural Athletics

1) List by sport the number of teams engaged in intramural competition, including the number of:

   a) all boy teams and number of members on a team;

   b) all girl teams and number of members on a team;

   c) mixed teams (how many boys and girls on each team).

2) A list of the number of competitive events each of the above teams has scheduled.

3) List of coaches by name and sex for each of the above teams.

4) The salaries each of the above receives for intramural coaching.

5) Total hours of coaching each team receives.

6) Expenditures for boys intramural athletics, girls intramural athletics, and for mixed teams intramural athletics.

b. Interscholastic Athletics

1) A list by sports of each interscholastic team sponsored by the school including the number boys and girls on each team, the names and sexes of the coaches of each team, the number of competitive events each team has scheduled, and the budget for each team.

2) Total hours of coaching each team receives.

3) Aggregate budgets for the current and past two years for girls' teams, boys' teams, and mixed teams.

4) Total amount of practice time each team is allotted and a description of the practice facilities and specific time periods allotted each team for their use.

5) Facility or facilities used by each team for competitive events away from home including the events away from home in which each team participates, where each team plays, mode or modes of transportation used by each team, and per diem allowances, if any, for each team.

6) Copies of rules or by-laws of any interscholastic athletic association or league in which the District or the teams participate.

6. Honors and Awards

a. For elementary, junior high and high schools, a list of all organizations including athletic organizations, for which students are selected on the basis of achievement, services or a combination of both, and the membership in each such organization broken down by sex.

b. For junior and senior high schools, a list of any prizes, awards, or scholarships awarded to students in the past three years, including the name and sex of each recipient and a description of the extent to which the school or LEA participated in the nomination and selection process.

7. Codes of Conduct

a. Copy of student handbooks or other statements setting forth regulations governing punishments or penalties, including suspensions or explusions.

b. Records of disciplinary actions taken against students, including the:

1) sex of student;

2) nature of offense;

3) type of action taken (detention hall, paddling, days suspended, etc.)

c. Name and sex of individuals who have responsibility for determining or enacting disciplinary sanctions. Does the sex of the individual meting out punishment depend upon the sex of the student upon whom the sanction is imposed? Are only individuals of one sex responsible for discipline? If so, why?

While this list is formidable in appearance, the work involved in actually submitting the requested information is usually not as overwhelming as it first appears. Also, not all of the information described here is routinely requested of every district selected to undergo a compliance review. A similar list of information could be compiled relating to the other areas of compliance over which the OCR has enforcement jurisdiction, e.g., Title VI of the Civil Rights Act of 1964, Section 504 of the Vocational Rehabilitation Act of 1973, and the Age Discrimination Act of 1967.